Supreme Court, U.S.
FILED
FEB 16 2000
CLERK

No. 99-312

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), this Court held that the Federal Highway Administration's ("FHWA") warning-device regulations at 23 C.F.R. § 646.214(b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained," 507 U.S. at 670, and by limiting the financial responsibility of railroads for federally funded crossing improvements, *id.* at 671. Under the Federal Railroad Safety Act, 49 U.S.C. § 20106, this Court held, those regulations "cover[] the subject matter of" state tort law imposing a duty of care on railroads in the selection of warning devices. *Easterwood*, 507 U.S. at 670. Accordingly, "*when they are applicable*, state tort law is pre-empted." *Id.* (emphasis added). By their plain terms, those regulations are applicable, *inter alia*, to "*any* project where Federal-aid funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i) (emphasis added). Thus, this Court held that state tort law "impos[ing] an independent duty on a railroad to identify and/or repair dangerous crossings" is pre-empted "for projects in which federal funds participate in the installation of warning devices." 507 U.S. at 671.

Despite the authority of *Easterwood*, respondent and the United States as *amicus curiae* now argue that the regulation does not mean what it plainly says. They contend that subsections (b)(3) and (b)(4) are inapplicable to projects in which federal funds participate in the installation of the predominant (and perfectly acceptable) form of warning devices at the nation's public grade crossings: namely, passive devices such as signs and pavement markings. See Resp. Br. 38-39. This interpretation is irreconcilable with the plain meaning of the regulation.

It defies the statutory scheme. It has not been adopted by any court. It is contrary to the positions taken by the United States in *Easterwood*, see Pet. Br. 28-29, and in a 1995 notice of proposed rulemaking stating that under *Easterwood* preemption "depend[s] upon whether or not improvements to a particular grade crossing were federally funded."[1] The new theory also conflicts with the one taken by respondent both in the court of appeals and in her opposition to certiorari.[2] Most fundamentally, it is contrary to the understanding of the States who are subject to the approval regime of 23 C.F.R. § 646.214(b). The *amici* States supporting petitioner affirmatively state that all federal funding projects, including those for signs, are administered under (b)(3) and (b)(4).[3] Even the States supporting affirmance do not embrace this novel theory. See Br. of North Carolina *et al.* as *Amici Curiae* at 13-19 (arguing that *Easterwood* was wrongly decided). In short, the new theory of respondent and the Solicitor

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[1] Selection and Installation of Grade Crossing Warning Systems, 60 Fed. Reg. 11,649, 11,651 (Mar. 2, 1995) (*"Warning Systems"*). *See also* Br. for the United States as *Amicus Curiae* at 24, *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993) (Nos. 91-790, 91-1206) (*"for federally funded projects . . .*, [t]he regulation requires gate arms in certain circumstances, and requires FHWA approval of the safety devices *in all other circumstances*") (second emphasis added). It is also inconsistent with a later *amicus* brief, which argued that (b)(4) applied to passive-device projects but preemption required express FHWA approval of the devices. *See Amicus Curiae* Br. of the United States at 18-22, *Pearson* v. *Columbus & Greenville Ry. Co.*, 672 So.2d 773 (Miss. Ct. App. 1995) (No. 93-CA-01265-COA) (Supplemental Lodging for Petitioner, Tab A).

[2] Br. of Appellee at 28 (No. 96-6371) (C.A. Docket Apr. 24, 1997) (not contesting the applicability of the regulations but arguing that the predicate for preemption was lacking if she could prove at trial the existence of (b)(3) conditions); Opp. 6-8 (same).

[3] Br. of Texas as *Amicus Curiae* at 7. *See also* Lodging for the Association of American Railroads (letters from nine other States or state agencies that the rule below interferes with the (b)(3) and (b)(4) scheme).

General is neither a fair reading of the regulation nor an accurate account of historical administrative practice, but simply a *post-hoc* contrivance invented for this case that should be rejected.

ARGUMENT

I. THE FHWA DOES NOT ADMINISTER A DISTINCT "MINIMUM PROTECTION PROGRAM" NOT COVERED BY 23 C.F.R. § 646.214(b)(3)-(4).

Conveniently using nomenclature specific to the Tennessee Department of Transportation ("TDOT"), respondent and the Solicitor General strive to convince this Court that the FHWA administers two separate programs—what they style "the minimum protection program" and "the hazard" or "priority" program—that purportedly are implemented by two separate regulations. See, *e.g.*, U.S. Br. 7, 10; Resp. Br. 1, 4-6, 22-23, 25, 28. They contend that the hazard program involves crossing surveys, data analysis, diagnostic teams and development of priority improvement projects. See, *e.g.*, Resp. Br. 5. They argue that, by contrast, the distinct "minimum protection program" involves no data collection and analysis, *id.* at 6, 35, but simply "the release" of federal funds to meet the signs requirement of 23 U.S.C. § 130(d). *Id.* at 23.

That claim is patently false, and belied by the statute and regulations. Section 130(d) provides in full:

> Each State shall conduct and systematically maintain a survey of *all highways* to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a *schedule of projects* for this purpose. *At a minimum, such a schedule* shall provide signs for all railway-highway crossings.

23 U.S.C. § 130(d) (emphases added). Congress created a unitary section 130 crossing program under which States would systematically gather data on every single crossing, evaluate the conditions at every crossing to iden-

tify hazardous ones in need of safety improvements, and then establish a schedule of projects. The phrase "at a minimum" is not referring to the level of protection at certain crossings, but rather establishes that provision of signs "for *all* railway-highway crossings" is a minimum requirement of the schedule. *Accord* 23 C.F.R. § 924.9 (a)(3)-(4) & (b).

Congress thus did not create an ongoing "minimum protection" program for unanalyzed crossings that would be left without adequate protection. Instead, it intended that the States, through individualized, data-driven analysis of crossing hazards, would identify the "large number of crossings carrying low volumes of both vehicular and train traffic" that lacked "sufficient accident potential to justify train actuated protection." H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1893. Congress appropriated funds "to provid[e] *adequate* signing at all such crossings," and envisioned that by 1976 "every railroad crossing w[ould] be equipped with *adequate* warning signs located at a proper distance from a crossing, and new high visibility signs at the rail-highway crossing proper." *Id.* (emphases added); see also U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem*, ii (1972) ("*1972 Crossings Report (Part II)*") (requiring passive devices "to *effectively* treat the large number of *lower volume crossings that do not warrant active protection* and to provide effective advance warning at all crossings") (emphasis added). Because they are part of a unitary program, passive-device projects are paid for with the same federal funds under the same procedures as other crossing-improvement projects, see 23 C.F.R. § 924.11(b); Pet. Br. 16-17, and they are likewise submitted to the FHWA to "be *approved* by the Division Engineer." 6 U.S. Dep't of Transp., Transmittal 39, *Federal-Aid Highway Program Manual* § 8-2-1, ¶ 6.c(1) (1974) (Respondent's Lodging). See also 23 C.F.R. § 630.205(e); Pet. Br. 16-17.

II. THE WARNING-DEVICE REGULATION APPLIES TO ALL FEDERALLY FUNDED DEVICES.

Respondent and the Solicitor General suggest this false dichotomy in section 130(d) to bolster a claim that separate regulations implement the "minimum protection program" and the "hazard program." They maintain that 23 C.F.R. § 646.214(b)(1) is the "minimal-protection regulation" that exclusively "implement[s] the minimum protection requirement in 23 U.S.C. 130(d)," U.S. Br. 10; Resp. Br. 37, whereas, the preemptive regulations of (b)(3) and (b)(4) pertain only to diagnostic-team evaluations of crossings in the "long-term prioritization program," U.S. Br. 10. This position cannot be reconciled with the regulatory text.

First, characterization of (b)(1) as the "minimal-protection regulation" is disingenuous. This regulation by its terms mandates that "[a]ll traffic control devices shall comply with the . . . Manual on Uniform Traffic Control Devices for Streets and Highways [("*MUTCD*")], 23 C.F.R. § 646.214(b), and is designed to ensure uniform standards for active devices like gates and flashers as well as passive devices. See *MUTCD* at 8C-1 to 8C-9 (1988) (standards for gates and flashers). The crossbucks requirement is one of a host of *MUTCD* rules made mandatory by (b)(1) for both active and passive devices, and nothing in (b)(1) excludes passive devices from the adequacy rules of (b)(3) and (b)(4).[4]

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[4] Furthermore, signs-and-markings projects cannot be said to be necessary to implement a statutory mandate of "signs" at all crossings. Markings are regarded as distinct traffic control devices from signs under both the *MUTCD* and federal regulations. *MUTCD* at 2A-1, 3A-1 (devoting Part II to "Signs" and Part III to "Markings"); 23 C.F.R. § 646.204 (passive warning devices).

As to (b)(3) and (4), even though the issue is the applicability of these preemptive regulations, respondent and the Solicitor General steadfastly ignore the operative language defining when (b)(3) and (b)(4) apply: namely, to "*any* project where Federal-aid funds participate in the installation of the devices." 23 C.F.R. § 646.214(b)(3)(i) (emphasis added). The words "project" and "devices" are defined terms in the regulations that clearly encompass projects for the installation of passive warning devices. See 23 C.F.R. § 646.200(b) (term "*projects*[] applies to Federal-aid projects involving railroad facilities, including projects for the elimination of hazards of railroad-highway crossings"); *id.* § 646.206(a)(3) ("Projects for the elimination of hazards . . . of railroad-highway crossings may include but are not limited to . . . [g]rade crossing improvements")[5]; *id.* § 646.204 (defining "signs, markings, and other devices" as "[p]assive warning devices"). This Court does not deviate from defined terms in a regulation or statute. Moreover, not only does the regulation use the broadly defined term "project," but it explicitly provides that the rules it sets forth apply to "any project." *Id.* § 646.214(b)(3)(i). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). The Solicitor General nowhere explains how some *projects* do not fall within the regulation's all-inclusive language.

The Solicitor General contests the plain-language reading of "any project" because allegedly "[t]he applicability of (b)(3) . . . cannot be determined without a diagnostic team reviewing the particular crossing." U.S. Br. 18. This is absurd on its face. Diagnostic teams conduct

[5] The term "crossing improvement" encompasses the "installation of standard signs and pavement markings." U.S. Dep't of Transp., *Railroad-Highway Crossing Handbook* 183 (2d ed. 1986) ("*Crossing Handbook*").

detailed, on-site engineering studies of crossings that "have been selected from the priority schedule." *Crossing Handbook* at 79; 23 C.F.R. § 924.9(a)(3) (engineering studies are to be conducted at identified "hazardous locations"). A diagnostic team—which "usually includes a highway traffic engineer, a railroad signal engineer, and, as appropriate, representatives of highway design and maintenance agencies and federal, state, and local officials," U.S. Br. 7 n.15—is not necessary to determine the simple factual point of whether there are "[m]ultiple main line railroad tracks" at a crossing. 23 C.F.R. § 646.214(b)(3)(i)(A). Nor is such a team necessary, for example, to determine whether there are multiple (non-mainline) train tracks where the trains may pass simultaneously, *id.* § 646.214(b)(3)(i)(B), "[h]igh [s]peed train[s] . . . combined with limited sight distance," *id.* § 646.214(b)(3)(i)(C), "[a] combination of high speeds and moderately high volumes of highway and railroad traffic," *id.* § 646.214(b)(3)(i)(D), or "a high number of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, [or] continuing accident occurrences," *id.* § 646.214(b)(3)(i)(E).

These are *factual* triggers for the federal mandate of gates and flashers in federally funded installations. The State already will have identified (b)(3) factors in its crossing survey and compilation of accident data, and used some or all of these factors in assessing the accident risk of every crossing to develop a schedule of priority projects *before* a diagnostic team is even formed. See *Crossing Handbook* at 51-78.[6] *Amicus curiae* Texas has verified that it often programs section 130 installation projects based on hazard analysis and does not even form

[6] There is variation among the States as to what hazard factors are incorporated into the computerized analysis, and which are assessed separately. *See Crossing Handbook* at 78-79.

diagnostic teams until federal funds have been obligated for the project.[7]

There is no way to confine (b)(4) to those limited circumstances where diagnostic teams have ruled out (b)(3) conditions; it applies broadly to all "crossings where the requirements of . . . (b)(3) are not applicable." 23 C.F.R. § 646.214(b)(4). Respondent tries to rescue the mandatory-diagnostic-team theory by arguing that (b)(4) "is triggered only when a diagnostic team's recommendation 'justifies' to FHWA that lights and gates are not required" under (b)(3)(ii), Resp. Br. 38-39, because in that circumstance "FHWA may find that the [(b)(3)(i)] requirements are not applicable," 23 C.F.R. § 646.214(b)(3)(ii). That is nonsensical because (b)(3)(ii) is nothing more than a provision allowing FHWA to *waive* gates and flashers when the factual (b)(3)(i) conditions (such as multiple line tracks) exist. Only then does a diagnostic team need to "justif[y] that gates are not appropriate." *Id.* § 646.214(b)(3)(ii).

Moreover, the new theory creates an indefensible regulatory gap. If a State proposes a large project to install passive protective devices beyond the *MUTCD* minimum (such as rumble strips or continuously flashing lights, or, as in Tennessee, supplemental pavement markings, U.S. Br. 21 n.28), at crossings not evaluated by diagnostic teams, there would be no regulatory mechanism for FHWA to approve "the type of warning device" that would be paid for with federal funds, 23 C.F.R. § 646.214(b)(4). The notion that FHWA would be an impotent participant in the process and not retain approval authority

[7] At hazardous crossings, the diagnostic team verifies all facts bearing on device selection, including the existence of (b)(3) conditions. *See Crossing Handbook* at 55. The diagnostic team also may recommend flashers and gates even in the absence of such conditions (in which case the State must install them), 23 C.F.R. § 646.214(b)(3)(i)(F), or recommend that FHWA waive the flashers-and-gates requirement, *id.* § 646.214(b)(3)(ii).

to ensure the effective use of federal funds defies common sense. *Easterwood*'s straightforward reading of the regulation is the right one. The regulation divides the world into (b)(3) and (b)(4) crossings; for the former, gates and flashers are mandatory unless the FHWA waives the requirement, and device selections at all other crossings are "subject to the approval of FHWA," *id.* § 646.214(b)(4). See *Easterwood*, 507 U.S. at 669.

The new theory of respondent and the Solicitor General also fails because it is irreconcilable with the application of (b)(3) and (b)(4) to review of *all* grade crossings encompassed by federal-aid highway projects, a review mandated by subsection (b)(2) and 23 U.S.C. § 109(e). Tellingly, they do not even address this critical regulatory requirement, which forbids FHWA to accept any such project "until adequate warning devices for the crossing are installed and functioning properly." 23 C.F.R. § 646.214(b)(2).

The same "adequacy" requirements apply to (b)(2) crossings as to crossings where federal funds pay for devices. *Id.* § 646.214(b)(3)(i). If the Solicitor General were right that "[t]he applicability of (b)(3) . . . cannot be determined without a diagnostic team reviewing the particular crossing," U.S. Br. 18, then no federal-aid highway project could ever be accepted unless a diagnostic team studied every single crossing within or near the project. Crossings with only passive protection have always been prevalent on the federal-aid highway system. See *1972 Crossings Report (Part II)* at 7 (55% of such crossings have only passive protection). Myriad federal highway improvement projects—involving highway repavings or markings, installations or upgradings of guardrails or medians, widenings of highway shoulders, illumination, and the like—encompass crossings with passive as well as active devices. It would be a sheer impossibility and waste for a State to dispatch diagnostic teams to do engineering

studies of all such crossings, even when there is no question of a (b)(3) hazard. *Amicus curiae* Texas has again informed us that it does not conduct (or submit to FHWA) diagnostic studies of every crossing in every federal-aid highway project before FHWA accepts it.[8] Thus the adequacy requirements of (b)(3) and (b)(4) apply to *all* crossings within or near the limits of a federal-aid highway project or where federal funds participate in the installation of devices, not just priority hazardous crossings that warrant convening a diagnostic team.

The fact that a crossing was not selected for a diagnostic-team study as part of a given year's prioritization program, and was instead included in a general program to install passive devices, does not mean that the State has not given individualized consideration to a crossing, as respondent and the Solicitor General repeatedly state. First, it is often the case that a diagnostic team has studied a crossing in *prior* years and determined that active devices are unnecessary. The State will not reconsider that crossing absent new information suggesting danger. Oakwood Church Road Crossing is a perfect illustration. TDOT conducted a diagnostic team study of this crossing on June 9, 1983 (when the tracks were owned by another railroad), and found that:

> [t]his crossing does not have sufficient train/vehicle exposure to qualify for active devices . . ., nor is there a sight-distance problem at the crossing. The crossing will be upgraded with passive "Railroad Advance Warning" signs, pavement markings, etc. in

[8] No deference is due the Secretary's novel theory where the Court has already interpreted a provision of law, as it has done here. *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990). Regardless, the preconditions for deference—ambiguity in the regulation, consistency with the statute, and reasonableness of the interpretation—are not met. *See also Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (no deference to interpretations "wholly unsupported by regulations, rulings, or administrative practice").

> the Department's ongoing program for minimum grade crossing protection which is underway statewide.

Letter from Robert E. Farris, TDOT, to Rep. Ed Jones (June 17, 1983) (Cantrell Dep. Exh. 6) (Oct. 12, 1995) (W.D. Tenn. Docket Enry No. 52) (filed Feb. 16, 1996) (Supplemental Lodging for Petitioner, Tab C).[9] It distorts the ongoing nature of the section 130 program to look only at actions taken in the year of a funding decision.

Second, *all* crossings upgraded with federally funded passive protections, whether or not reviewed by a diag-

[9] Respondent found an "expert" to testify to the contrary, but his testimony demonstrates the arbitrariness of tort suits alleging the inadequacy of federally funded warning devices, given the preclusion of use of all official safety data by 23 U.S.C. § 409. According to the "expert," Oakwood Church Road Crossing was one of the more dangerous crossings in the country, beset by numerous hazardous (b)(3) conditions, any one of which would mandate gates and flashers under federal law. *See* Resp. Br. 36. Only one of his findings was directly refutable in court: namely, his erroneous contention that 40 mph was the standard for "high speed trains," Tr. 149. *Cf.* 49 C.F.R. § 213.301 (80 mph standard); U.S. Dep't of Commerce, Policy and Procedures Memorandum 21-10, ¶ 20(c)(4) (1958) (*"PPM"*) (Lodging for Petitioner) (former standard of 70 mph). But the witness also testified that the mere use of propane tanks by rural residents implied use of the crossing by "substantial numbers of . . . trucks carrying hazardous materials," 23 C.F.R. § 646.214(b)(3)(i)(E); Tr. 147. That dubious claim not only usurped the State's prerogative to define that standard, Pet. Br. 39 n.20, but it also could not by law be rebutted by the State's actual assessment. Moreover, the witness made wildly exaggerated estimates of train movements and vehicular traffic based on personal observation, Tr. 145-47, that were directly refutable by inadmissible official crossing inventory data. (If this Court believes that section 409 permits it to consider the crossing inventory report to resolve the strictly legal issues presented, the report is in petitioner's Supplemental Lodging, Tab E.)

nostic team, receive individualized consideration.[10] State officials must periodically visit the crossing to gather inventory information and fulfill the State's systematic survey obligations under section 130(d); the State must analyze, in processes approved by the FHWA, the accident potential of each crossing based on its specific conditions in compiling its hazard index, Pet. Br. 33-35, and, as happened *in this project*, when the State works up an estimate for federal funds to upgrade passive protections, an expert highway official must visit the site to determine what devices are required to comply with federal and state regulatory standards. See, *e.g.*, J.A. 134; Cantrell Dep. at 9 (May 3, 1995) (W.D. Tenn. Docket Entry No. 52) (filed Feb. 16, 1996) (Supplemental Lodging for Petitioner, Tab B). After the Tennessee team performed this review, "the projects were program[m]ed and sent to [FHWA] for their approval," Cantrell Dep. at 9, clearly under (b)(4). The State does not make device selections willy nilly in ignorance of crossing conditions;[11] when it installs passive devices at a crossing, it has determined that the risks of having those devices at a particular crossing are acceptable under the circumstances.[12] See

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[10] In any event, FHWA has always deemed adequate state device recommendations "of a general or Statewide nature and not for a specific project." *See PPM* 21-10, ¶ 20(5).

[11] Respondent mischaracterizes the testimony of the Tennessee highway engineer as saying that there was no individualized consideration of crossings in this project. Resp. Br. 31-37. He testified to the obvious fact that there was no crossing-specific engineering analysis during the sign project itself. *Id.* at 32, 35. But he also testified that every crossing in Tennessee was analyzed for accident potential before improvement decisions were made, J.A. 100, and that each of the improved crossings was visited by a design team.

[12] If a State identifies a crossing as hazardous but lacks immediate funds to install active devices, it does not ordinarily leave the public at risk, as respondent suggests. Interim measures are taken, such as "install[ing] a STOP sign . . . until active [devices] can be installed." *MUTCD* at 8B-9.

Letter from Greg Schertz, FHWA, to R.E. Stotzer, Jr. 1-2 (Jan. 17, 1989) (Supplemental Lodging for Petitioner, Tab D).

In summary, this Court should reject the attempt of respondent and the Solicitor General to redefine the legal standard of "adequacy" of federally funded devices as optimization of crossing protection through diagnostic-team evaluation. See, *e.g.*, Resp. Br. 37. "Adequate warning devices" is a defined term under the regulations: warning devices meet federal adequacy standards so long as (b)(3) conditions requiring automatic gates and flashers are absent, and the devices are "subject to the approval of FHWA." FRSA preemption does not require a congruence of federal and state law; the federal regulation must simply "cover[] the subject matter." 49 U.S.C. § 20106. For all federally funded installations, subsections (b)(3) and (b)(4) cover the subject matter because they "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Easterwood*, 507 U.S. at 670.[13] The devices at Oakwood Church

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[13] Respondent floats the argument (not joined by the Solicitor General) that there is no preemption because pavement markings allegedly required by the *MUTCD* were not present. Resp. Br. 20-22. But preemption depends on the applicability of a regulation covering the subject matter of state law, not on an FHWA or state official's compliance with that regulation. *See Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 308 (7th Cir. 1994) ("the preemptive effect of a safety requirement laid down by the Secretary cannot be challenged in a tort suit by arguing to the court that he made a mistake"). In any event, respondent misapplies the *MUTCD*, which at the time only required pavement markings when "the prevailing speed of highway traffic is 40 mph or greater." *MUTCD* at 8B-5. Oakwood Church Road intersects U.S. Highway 45 less than 90 feet from the crosssing, and there is a stop sign at the intersection of the highways. Pl. Mem. Sum. Judg., Burnham Affidavit, Exh. D (W.D. Tenn. Docket Entry No. 40) (filed Feb. 16, 1996). Because cars from one direction have only 90 feet in which to accelerate, and cars from the other direction must slow down as they approach the intersection, it is unlikely that the prevailing speed at the cross-

Road were installed with federal funds and subject to FHWA approval. Thus, respondent's inadequate-device claims are preempted.[14]

Even if the regulation were not so clear as it is, the statute it implements forbids the interpretation advanced by the respondent and the Solicitor General. Congress placed upon the Secretary of Transportation longstanding duties to (1) approve only those federal-aid projects providing facilities that will "adequately serve" traffic needs "in a manner that is conducive to safety," 23 U.S.C. § 109(a); (2) permit only those "warning signs . . . as will promote the safe and efficient utilization of the highways," *id.* § 109(d); and (3) approve "[n]o funds . . . for expenditure on any Federal-aid highway . . . unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation . . . on that portion of the highway with respect to which such expenditures are to be made," *id.* § 109(e).

Respondent and the Solicitor General attempt to escape section 109 by arguing that in 1987 Oakwood Church Road was not a "federal-aid highway" under the former definition of that term, 23 U.S.C. § 101(a) (1988); U.S. Br. 24. and thus section 109 does not apply. This is wrong. It is undisputed that, on the heels of section 130(d). Congress. in 1975 (before the promulgation of the regulation) and again in 1976, expressly made the requirements of chapter 1 of Title 23—including section 109—applicable to all off-system roads. Pub. L. No. 94-280, § 203(c), 90 Stat. 451, 452 (1976) (Rail-Highway Crossings Off-System Program); Pub. L. No. 93-643, § 122(a),

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ing was anything near 40 mph, which may be why Mr. Shanklin was driving at 20 mph at the time of the accident, Pet. App. 2a.

[14] The Solicitor General is correct that federal funding is generally not preemptive, U.S. Br. 22, but it is preemptive here because it triggers the imposition of federal-law decisional requirements. *Easterwood*, 507 U.S. at 671.

88 Stat. 2281, 2289 (1975) (formerly codified at 23 U.S.C. § 219; repealed 1987); cf. U.S. Dep't of Transp., Memorandum, *Producing a Schedule in Each State for Signing and Marking All Public Railroad-Highway Grade Crossings* 2 (Oct. 8, 1976) ("*1976 Memorandum*") (section 219 funds used for signs) (Respondent's Lodging).

The Solicitor General contends that Congress abolished the requirement of compliance with section 109 when it merged the Off-System and On-System programs in 1978. This interpretation simply makes no sense. First, concerned that "about one-half of the 170,000 grade crossings off the Federal aid-system ha[d] inadequate warning devices" and wanting to "bring warning devices at off-system crossings up to acceptable levels," H.R. Rep. No. 95-1485, at 44 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6575, 6620, Congress simply eliminated funding categories to give the States more flexibility to address inadequate off-system crossings. See Comptroller General, CED-78-83, *Rail Crossing Safety—At What Price?* 29 (Apr. 25, 1978). The Solicitor General's interpretation bizarrely implies that Congress meant to eliminate adequacy requirements even for the most hazardous off-system crossings. Second, the express requirement of section 109 compliance was retained for improvements funded under section 219, see 23 U.S.C. § 219(e) (1982), and Congress could not have intended the applicability of section 109 to turn on the source of the appropriations. It is clear that unified standards applied to all crossings in the merged program, and thus section 109 applied to Oakwood Church Road in 1987.

Regardless, respondent and the Solicitor General cannot escape section 109's mandate by arguing about the status of this particular highway, for they are advancing an interpretation of the regulation that applies to *all* highways. If their interpretation of 23 C.F.R. § 646.214 (b)(3) and (4) conflicts with the statute, it cannot be adopted. The FHWA has always funded large-scale sign-

installation projects on federal-aid highways. *1976 Memorandum* at 2. Because the so-called "minimum protection program" is conducted on federal-aid highways, they must explain how the FHWA can permit the installation of assertedly "inadequate" passive devices and still comply with section 109(e). Furthermore, FHWA's principal push on signs occurred from 1975 to 1978, when section 109(e) unquestionably applied to all crossings. See *id.*

There is no way to reconcile the new interpretation of (b)(3) and (b)(4) with section 109(e). As respondent acknowledges, section 109(e) imposes "a *per se* rule" that warning devices on covered highways comply with federal adequacy standards. Resp. Br. 40. Section 130(d)'s requirement of signs at all crossings cannot be read as an implied limitation on 109(e). Section 130(d) is a condition of receiving *any* federal crossing funds, *Easterwood*, 507 U.S. at 663; U.S. Br. 15, and States must comply with its requirements regardless of whether they receive federal funds to install the signs. Section 109(e), on the other hand, is a *project-specific* limitation on the expenditure of federal funds. Thus, when (b)(3) conditions apply, gates and flashers are the "absolute minimum requirements" for receiving federal funds. U.S. Dep't. of Transp., HNG-14, at 1 (March 20, 1973) (Lodging for Petitioner). The Solicitor General equivocates that section 109(e) "dictates a contextual and time-sensitive inquiry" into adequacy, U.S. Br. 25, but the Department's longstanding interpretation has always been that "definite provision shall be made in the conditions of the proposed project for the installation of proper safety devices, either with or without Federal-aid participation." *PPM* 21-10, ¶ 20 a. Nor does this straightforward reading of section 109(e) prevent FHWA from funding projects for signs "because such programs by definition install minimum rather than adequate protection." U.S. Br. 25. The Solicitor General simply ignores once again the regulatory definition of "adequacy": that is, adequacy consists of gates and flashers if (b)(3) conditions exist, and, if not, the device is subject to FHWA approval. Thus, federal funding of passive-protection projects is normally available without affront to federal adequacy standards; it is only not permitted in the narrow circumstance of a (b)(3) crossing where there are no gates and flashers and no "definite provision" in the project for installing them.

III. THERE ARE NO POLICY REASONS TO NARROW *EASTERWOOD*.

Their statutory and regulatory analysis unavailing, respondent and the Solicitor General invoke the presumption against preemption. That issue is already settled by *Easterwood*. The presumption is only relevant to interpreting the express preemption provision of the FRSA, and, applying that presumption, this Court nonetheless found that subsections 646.214(b)(3) and (4) cover the subject matter of a railroad's state law duty of care in selecting warning devices. This Court also directly rejected the argument that "the preemptive scope of federal regulations likewise turns upon the intent of the promulgating authority." U.S. Br. 14. It held to the contrary that FRSA does not "call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter of [state law]." *Easterwood*, 507 U.S. at 675.

Adherence to *Easterwood* also does not grant "a blanket immunization for the railroads from tort liability" for crossing accidents, see U.S. Br. 26. *Easterwood* left most of the railroad's common-law duty to provide fair warning intact (such as the duty to blow horns, ring bells, and display lights on approach), and was careful to limit its preemption holding to "tort law [that] seeks to impose an *independent* duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671 (emphasis

added).[15] In the modern era where motor vehicle traffic is the principal creator of risk at railway crossings, see Pet. Br. 4, safety depends on traffic control, and railroads have no independent authority whatever to stop traffic with gates, or to post signs or mark pavement on a public right-of-way. Furthermore, for federally funded projects, the railroads do not conduct independent evaluation and selection of devices; that function belongs to the States. Thus, for all projects where federal funds participate in the installation of devices, the FHWA regulations at "§§ 646.214(b)(3) and (4) effectively set the terms under which railroads are to participate in the improvement of crossings," and limit "railroad involvement in the selection of warning devices" to "participation in diagnostic teams," if the State invites them. *Easterwood*, 507 U.S. at 670-71. Where railroads no longer act because of the federal scheme, they no longer have a legal duty.

Contrary to the claims of respondent, adhering to the rule of *Easterwood* in this case does not deprive plaintiffs of a remedy for any wrong done to them by the railroad. Railroads remain liable for breach of all retained state and federal duties at railroad crossings, including breach of any duties assigned to railroads under the section 130 program. See Pet. Br. 47 n.25. The "wrong" the railroad allegedly committed was the failure to offer to pay the government for crossing improvements the government had chosen not to fund. See J.A. 107-08; Resp. Br. 23-24. Not only is this irrational, but having state tort law impose duties on railroads to subsidize supplemental improvements would directly conflict with the federal-law prohibition of a railroad's paying any portion of improvement costs at federally funded crossings. *Easterwood*, 507 U.S. at 671.

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[15] *Easterwood* also therefore does not preempt other state laws unrelated to the railroad's common law duties regarding device selection. *Cf.* Resp. Br. 28-29.

Finally, the suggestion that proper interpretation of *Easterwood* would have "terrible implications for safety," Resp. Br. 27, is fallacious. The Department of Transportation has recognized that because "[a] railroad has only data available to it which is railroad specific," it "do[es] not have the requisite analytical . . . ability to make the appropriate decisions regarding the most appropriate focusing of limited safety improvement funds." *Warning Systems*, 60 Fed. Reg. at 11,649-50.[16] State tort law distorts rather than augments the section 130 program:

> While this system may have been appropriate in the past, when there was no systematic and uniform improvement program in existence, today the result is one of misallocation of scarce resources.

Id. at 11,651.

Aside from the undesirability of any railroad duplication of the section 130 program, it is simply a practical impossibility. Norfolk Southern has more than 20,000 public grade crossings on its system; the Union Pacific has 31,000. U.S. Dep't of Transp., *Railroad Safety Statistics Annual Report 1998* Tables 9-1, 9-2 (1999). Moreover, it would also be economically irrational for a railroad to fund improvements, which can exceed $100,000 at a crossing, 60 Fed. Reg. at 11,650, given that (as the Secretary recognizes) such improvements *yield no net*

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[16] *Warning Systems* was a rulemaking to go beyond *Easterwood* and preempt railroad tort duties even where devices are not federally funded. 60 Fed. Reg. at 11,651. Under pressure from the trial lawyers, the Department terminated the rulemaking, declaring that it lacked the hard data to ensure that railroad safety would be "best served by issuance of such a regulation *at this time*." Selection and Installation of Grade Crossing Warning Systems; Termination of Rulemaking, 62 Fed. Reg. 42,733, 42,733, 42,734 (Aug. 8, 1997) (emphasis added). The Department emphasized, however, that it "continues to believe that the proper relationship between railroads and state and local governments in terms of selection and installation of warning systems is as proposed in the NPRM." *Id.* at 42,734.

benefit to the railroad. Pet. Br. 12; 60 Fed. Reg. at 11,651 (a railroad responsibly expending safety funds may still "be subjected to large tort judgments resulting from the relatively random occurrence of accidents at grade crossings of low hazard relative to those improved"). In sum, respondent is not crusading for safety, but for a socially deadweight transfer of money to plaintiffs, and to the trial lawyers and plaintiffs' witnesses who thrive on grade crossing litigation.

CONCLUSION

This Court should adhere to *Easterwood* and reverse the judgment below.

Respectfully submitted,

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February 16, 2000

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